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IN THE

Supreme Court of the United States

October Term, 1959

No. 242

KAARE PETERSON,

Petitioner,

against

SEABOARD MARINE SERVICE CORPORATION and THE STATE INSURANCE FUND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS BLOCH,
Proctor for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case April 28, 1959.

Opinions Below

The opinion of the United States District Court, for the Southern District of New York is officially reported in 159 Fed. Supp. 27.

The opinion of the United States Court of Appeals is not yet officially reported and is printed in Appendix "A".

Jurisdiction

The judgment of the United States Court of Appeals was dated and entered April 28, 1959. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

Questions Presented

Which of the interpretations of Sec. 933, sub-sections (f) and (g) of the U. S. Code of the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, as amended, etc., correctly construed the law, namely, whether by the Deputy Commissioner holding that in view of the full reimbursement out of the petitioner's third party settlement to the employer and its compensation carrier for all compensation and medical payments voluntarily made by them, petitioner's claim for deficiency compensation should be computed *de novo* as done by the Deputy Commissioner and no further credit given to the employer and its carrier except the net amount of the recovery by the petitioner from the third party settlement or the interpretation by the Court below which affirmed the District Court's decision reversing the finding by the Deputy Commissioner and holding to the contrary?

Reasons for Granting the Writ

The Court below interpreted the applicable law in a manner which constitutes a radical departure from the well recognized and uniform holdings followed by Deputy Commissioners over the years and throughout the country.

There is a conflict of decisions between that by the Court below of the following cases:

Voris v. *Gulf Tide Steve. Inc.*, 211 Fed. 2nd;
Anderson v. *Hoage*, 70 Fed. 2nd 773;
Luckenbach S. S. Co. v. *Norton*, 96 Fed. 2nd 764.

Whether the foregoing section should receive the liberal interpretation of the statement or strict interpretation by the District Court and Circuit Court of Appeals.

Pacific Pine Case, 31 Fed. 2nd 152;
Chapman v. *Hoage*, 296 U. S. 526.

Statement of the Case

The Deputy Commissioner found that the petitioner while employed by the Seaboard Marine Service Corporation sustained serious injuries as a result of an industrial accident on January 21, 1950 aboard a vessel afloat in the navigable waters of the United States. His employer and the insurance carrier, the State Insurance Fund, provided medical and hospital services and voluntarily paid compensation for total disability from January 22, 1950 to December 5, 1951 in the sum of $3,410. Medical and hospital bills up to that date amounted to $2,553.87 making a grand total of $5,963.87 paid by the carrier for such compensation and medical payments.

On December 4, 1951, the employee gave due notice to the Deputy Commissioner of his intention to sue a third party tort-feasor responsible for his injuries. The insurance carrier thereupon suspended payments of compensation and filed its lien of $5,963.87 for the payments made to the petitioner for medical care and compensation.

The suit against the third party tort-feasor, Waterman Steamship Co., was settled for $25,000 with the written consent of the carrier, State Insurance Fund. From this amount, attorneys' fees and court costs were deducted in the sum of $9,036.13. The State Insurance Fund was reimbursed in full in the sum of $5,963.87 for its lien covering medical and compensation payments and the balance of $10,000 was paid to the injured employee, the petitioner herein.

Subsequently thereto, the petitioner, contending that he was permanently and totally disabled because of his injuries, commenced proceedings for the resumption of compensation payments pursuant to Section 908(a) of the Act. (See also Sections 933(f) and (g). The carrier, having stipulated to the permanent total disability of the petitioner, a formal order was duly made and filed by the Deputy Commissioner awarding compensation for permanent total disability from January 22, 1950, the date of the accident, to July 6, 1957, the date of the conference, at $35 per week totalling $13,615. The Deputy Commissioner thereupon credited the carrier with the net amount of $10,000 received by the petitioner from his third party settlement leaving a balance of $3,615 payable immediately to the petitioner and directed that payments continue at $35 per week during continuance of total disability.

The State Insurance Fund attacked the order of the Deputy Commissioner and brought an action in the United States District Court for the Southern District of New York for an injunction and recision of the Deputy Commissioner's order contending that, in addition to the $10,000 credit allowed by the Deputy Commissioner, it should also receive credit for the $3,410 representing the voluntary payments of compensation made by it prior to the institution of the third party action, even though it had already been reimbursed in full for the settlement.

After issue was joined the Carrier made a motion for summary judgment which was granted. The petitioner appealed herein to the United States Court of Appeals for the Second Circuit which affirmed the decision.

Argument

The Court below erroneously construed Section 933 subdiv. (f) of the United States Code in Longshoremen's cases, as well as the purpose and intent of this source of legislation.

There is no dispute by the parties as to the facts or to the right of the respondent carrier to reimbursement. But once such reimbursement has been made in full, Sec. 933 (f) confers in clear and unequivocal language the sole right upon the Deputy Commissioner to ascertain the amount of deficiency compensation by directing the employer to pay "* * * as compensation under this act *a sum equal to the excess of the amount which the Commissioner determines* is payable on account of such injury or death *over the amount* recovered against such such third person." The words "over the amount recovered against such third person" obviously refer to the actual amount received by petitioner after deduction of counsel fees and respondent's lien. See *Voris* v. *Gulf Tide Stevedores, Inc.*: 211 Fed. 2nd 549. The section further confers upon the commissioner the sole right to determine the amount of the deficiency compensation "* * * *which the commissioner determines is payable* on account of such injury * * * over the amount recovered against such third person."

The Deputy Commissioner properly took all the facts in consideration including the full reimbursement by the respondent carrier and applied a liberal interpretation of the statute having in mind the purpose and philisophy of this social legislation. *Pacific Pine case*, 31 Fed. 2nd 152 at page 154; *Chapman* v. *Hoage*, 296 U. S. 526 and *Voris* v. *Gulf Tide Stevedores Inc.*, *supra*.

By seeking additional credit of $3,410. the compensation previously paid for which it has been reimbursed, the respondent carrier is seeking in effect double indemnification for the one payment it has made for which concededly it has been reimbursed in full. It is axiomatic that an insurance carrier can only be indemnified once for its loss and risk. *Chapman* v. *Hoage*, *supra*.

Finally the findings of the Deputy Commissioner are presumed correct if his reasoning has been accurately ap-

plied. *Anderson* v. *Hoage*, 70 Fed. 2nd 773; *Luckenbach S. S. Co.* v. *Norton*, 96 Fed. 2nd 764. Thus the Deputy Commissioner concluded that the respondent carrier, having been reimbursed in full for its medical and compensation payments, had not and did not sustain a loss of one penny and computed the compensation *de novo* from the date of the accident to the date of the award and then credited the net amount of the third party recovery by the petitioner thus arriving at the deficiency compensable due.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS BLOCH,
Proctor for Petitioner.

APPENDIX

(Opinion of United States Court of Appeals, for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 306—October Term, 1958.

(Argued April 9, 1959 Decided April 28, 1959.)

Docket No. 25114

—o—

SEABOARD MARINE SERVICE CORPORATION,
Employer Plaintiff-Appellee,

—and—

THE STATE INSURANCE FUND,
Insurance Carrier Plaintiff-Appellee,

—v.—

ARNOLD J. QUIGLEY, Deputy Commissioner for the 2nd Compensation District of The United States Department of Labor, Bureau of Employees' Compensation,
Defendant-Appellee,

—and—

KAARE PETERSON,
Employee Defendant-Appellant.

—o—

Before:

HINCKS, LUMBARD and WATERMAN, *Circuit Judges.*

Suit by an employer and its insurance carrier, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §§901 *et seq.*, to modify an award made by the

Deputy Commissioner of the Department of Labor to Peterson, plaintiff's employee. The District Court for the Southern District of New York, Sugarman, *J.*, granted the plaintiffs' motion for summary judgment and Peterson appeals.

Affirmed.

Louis Bloch, New York, N. Y., *for defendant-appellant.*

Louis Bissell, New York, N. Y. (Charles G. Tierney, General Attorney of The State Insurance Fund, New York, N. Y., on the brief), *for plaintiffs-appellees.*

Per Curiam:

Peterson, having been injured in the course of his employment on January 21, 1950, received compensation from his employer's insurance carrier until December 4, 1951, when he announced his election to sue a third party for damages. The case was settled and out of the settlement the insurance carrier recovered what it already had disbursed for compensation and medical care. Thereafter, Peterson sought and was awarded deficiency compensation from January 22, 1950 to July 6, 1957. Judge Sugarman held that Peterson, having already been compensated for the period from January 22, 1950 to December 4, 1951, was entitled to no further award for that period. He granted summary judgment modifying the Deputy Commissioner's award, to make it run from December 4, 1951.

Upon the opinion below, D. C. S. D. N. Y., February 3, 1958, —— F. Supp. ——.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of April one thousand nine hundred and fifty-nine.

Present:

HON. CARROLL C. HINCKS,
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

SEABOARD MARINE SERVICE CORPORATION,
Employer-Plaintiff,

and

THE STATE INSURANCE FUND,
Insurance Carrier-Plaintiff,

v.

ARNOLD J. QUIGLEY, Deputy Commissioner for the 2nd Compensation District of the United States Department of Labor, Bureau of Employees' Compensation,
Defendant-Appellant,

and

KAARE PETERSON,
Employee-Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk.

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OCTOBER TERM, 1959

No. 242

KARE PETERSON,

Petitioner,

against

SEABOARD MARINE SERVICE CORPORATION and THE STATE INSURANCE FUND,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

KARE PETERSON,

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against

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case April 28, 1959.

Opinions Below

The opinion of the United States District Court, for the Southern District of New York, is officially reported in 159 Fed. Supp. 27.

The opinion of the United States Court of Appeals is not yet officially reported and is printed in Appendix "A".

Jurisdiction

The judgment of the United States Court of Appeals was dated and entered April 28, 1959. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

Question Presented

Question presented is whether an employee claiming compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 901, *et seq.*) and who recovered in a common law action against a third party tort feasor responsible for his injuries, must be twice compensated for the same period of disability, once by the tort feasor and again by the employer.

Statute Involved

33 U.S.C.A., Sec. 901, *et seq.*

Statement of the Case

Kaare Peterson, while in the employ of Seaboard Marine Service Corp., sustained an accident on January 21, 1950, and made claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. The employer's liability under the Act is not disputed.

Compensation benefits at the total disability rate of $35.00 per week were commenced and paid from January 22, 1950, to December 5, 1951, for a total of $3,410.00. Medical and hospital bills totalling the sum of $2,551.87 were also paid.

On December 4, 1951, the claimant filed with the Deputy Commissioner Notice of Election to Sue a Third Party.

Whereupon the payment of compensation benefits were suspended in accordance with the provisions of the law. Suit was commenced against the Waterman Steamship Co. and was settled for the sum of $25,000.00 with the consent of The State Insurance Fund, the insurance carrier.

The settlement in the sum of $25,000.00 was disbursed as follows:

(a) $9,036.13 for attorney's fee, court costs and litigation expenses.

(b) The State Insurance Fund received the sum of $5,963.87, which sum consisted of $3,410.00 paid in compensation benefits and $2,553.87 paid for medical and hospital expenses.

(c) The balance of $10,000.00 was paid to the injured employee.

Subsequent to the settlement of the third party action and the disbursement of the third party recovery, the claimant alleged that he is permanently and totally disabled as a result of the accident. Based thereon the Deputy Commissioner under the Longshoremen's and Harbor Workers' Act made an award from January 22, 1950 (first day of disability) to July 6, 1957, at the rate of $35.00 per week totalling the sum of $13,615.00, the Commissioner credited the carrier with the sum of $10,000.00, leaving a balance of $3,615.00 due the claimant in the opinion of the Deputy Commissioner.

The respondents contend that they should have been credited with the sum of $13,410.00, leaving a balance due the claimant on account of the above award in the sum of $205.00.

Although duly served, no answer was interposed by the Government in behalf of defendant, Arnold J. Quigley, Deputy Commissioner, Bureau of Employees' Compensation.

Argument

The petition should be denied for lack of conflict of opinion in the lower courts, for lack of substantial question of law involving the interests of a substantial segment of people.

The question attempted to be presented by petitioner has no mass significance or implication.

When consideration is given to the fact that but a small percentage of the American laboring force sustains industrial injury and that a minute percentage thereof is in employments under the protection of the Longshoremen's and Harbor Workers' Act and that an insignificant percentage thereof have tort feasor liability elements, it is apparent that the question attempted to be presented is puny indeed and unworthy of this Honorable Court's consideration.

The petition presents no questions of law even though it alleges at page 2, under "Reasons for Granting the Writ", that the Courts below interpreted the law in a manner which constitutes a radical departure from the well recognized and uniform holdings followed by "Deputy Commissioners over the years and throughout the country." The claim made is completely unsubstantiated. Certainly there is no proof of any nature in the record or otherwise that "Deputy Commissioners over the years and throughout the country" ruled or acted under similar facts in the manner contended for by the petitioner.

The petition presents no question of law even though the petitioner alleges at page 2 under "Reasons for Granting the Writ" that "there is a conflict of decisions between that by the Court below" and certain enumerated cases.

It is respectfully pointed out that none of the cited cases passed upon the question presented to the Courts below,

with exception of affirming the right of an employer to reimbursement out of the proceeds of recovery from third parties of compensation benefits advanced by the employer, there is complete lack of direct decision or even *obiter dicta* definitive or decisive of the question presented to the Courts below.

Within the scope of a compensation claim the proceeds of recovery in a third party action is in reality compensation and is therefore lumped with compensation payments made by the employer and carrier.

It has been judicially declared time and again that the fund created by the proceeds of a third party settlement in a compensation claim to the full extent thereof, if necessary, is for indemnification of the employer and carrier for compensation benefits paid. It is therefore in essence endowed with the characteristic of compensation. That is why the respondents alleged in Paragraph "Seventeenth" of the Bill of Complaint that:

> "The claimant received a total of $28,410.00 from the Waterman Steamship Co. and The State Insurance Fund representing the verdict against the said Waterman Company in the sum of $25,000 and the compensation received from The State Insurance Fund, the insurance carrier for the Seaboard Marine Service Corp. in the sum of $3,410.00."

It is only when the validity of the above allegation is understood that the issue of the amount that the employer and carrier must be credited with can be correctly ascertained. We therefore respectfully submit the following proposed computation in order that the essence of the respondent's position may be seen and properly evaluated both arithmetically and visually:

Third Party Recovery (gross)		$25,000.00
Expenses: Attorney's Fee and Misc. Expenses		9,036.13
Net Recovery		15,963.87
Compensation Paid	$3,410.00	
Medical Expenses Paid	2,553.87	
	$5,963.87	
State Insurance Fund Recovery from Third Party Carrier		5,963.87
Amount Actually Collected by Claimant from Third Party		10,000.00
Amount Collected by Claimant as Compensation		3,410.00
Award from January 22, 1950 to July 5, 1957		13,615.00
Total Money Benefits Received by Claimant		
Deficiency Compensation Due as of July 6, 1957		205.00

It is respectfully contended that the above computation is in accordance with the intent of the statute and does no violence to the rights of either the claimant or the employer and carrier.

In order to once more demonstrate the validity of the appellees' position the court is respectfully asked to assume that no payments of compensation were made and that a recovery in the sum of $25,000.00 was obtained in the third party action and that an award was made from January 22, 1950, to July 6, 1957, totalling the sum of $13,615.00. Is there any question that the employer and carrier would have the right to charge the award against the amount actually received by the claimant from the

third party recovery? Under such circumstances the computation would be as follows:

Third Party Recovery (gross)	$25,000.00
Expenses: Attorney's Fee and Misc. Expenses	9,036.13
Net Recovery	15,963.87
Medical Expenses Paid	2,553.87
Amount Actually Collected by Claimant from Third Party	13,410.00
Award for Compensation from January 22, 1950 to July 6, 1957	13,615.00
Deficiency Compensation Due as of July 6, 1957	205.00

By failing to reply the petitioner concedes the validity of the opinion and position of the District Court affirmed by the Court of Appeals that "if plaintiffs are compelled to pay the award without credit for the $3,410.00 included therein, Peterson will have been doubly imbursed for the period involved, once by Waterman in the settlement and, again by the plaintiffs under the award."

While the petitioner speaks of "liberal interpretation of the statute" (p. 5) he does not fully comprehend or refuses to accept the fact that the Compensation Law was not created for his profit. He has become obsessed with the error that since the employer was reimbursed the sum of $3,410.00 it is not conceivable that it should be credited with the payment even though as the District Court declared and the Court of Appeals agreed that he would be twice paid for the same period were the Commissioner's direction to stand.

This controversy and possible misunderstanding on the part of the petitioner may have been avoided were the

award to have commenced on December 1, 1951, under which circumstances the employer and carrier would have been entitled to credit only to the extent of the $10,000.00 received by the appellant from the third party recovery.

On December 5, 1951, the parties were in *status quo ante*. The petitioner having been advanced and received the sum of $3,410.00 in compensation benefits for the period from January 22, 1950, to December 5, 1951 and the respondents having been reimbursed the sum of $3,410.00 from the third party recovery. However, the award having been made to begin with January 22, 1950, it is quite clear that the respondents are entitled to credit in the sum of $13,410.00.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES G. TIERNEY,
General Attorney,
The State Insurance Fund,
Attorney for the Respondents.